LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 4 1972
E. ROBERT SEAVER, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-536

MARGARET ANN WILKINS, as Administratrix of the Estate of WILLIAM LANE WILKINS, Deceased,

Petitioner,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent.

PETITION FOR RE-HEARING AFTER DENIAL OF PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

DONALD SHERWOOD
401 Broadway
New York, N.Y. 10007
Counsel for Petitioner

HERBERT LEBOVICI
Of Counsel.

TABLE OF CONTENTS

	PAGE
Previous Proceedings	1
Reasons for Re-Hearing	2
POINT I - BOTH THE ERROR AND THE IMPORTANCE OF THE ISSUED SOUGHT TO BE BROUGHT BEFORE THIS COURT ARE INDICATED IN THE DECISION OF IN RE: SEABOARD SHIPPING CORPORATION, 449 F.2d 132	3
POINT II- IN DENYING CERTIORARI, THIS COURT MAY HAVE BEEN MISLED BY THE ERRONEOUS ALLEGATIONS OF THE ANSWERING BRIEF OF THE RESPONDENT HEREIN	6

Page

CASES CITED

Epling v. M.T. Epling,
435 F. 2d 732 5,7

In re: Seabord Shipping
Corporation,
449 F. 2d 132 (CA2) 2,3,4,5

Kernan v. American Dredging
Co., 355 U.S. 426 6,7

Lewis v. Hudson Waterways
Corporation, in the Southern
District of New York,
Ind. #67 Civ. 4288 5

Nolan v. Greene,
383 F.2d 814 5,7

Petition of Long (The
Smith Voyager),
439 F. 2d 109 3,5

Petition of Marine Sulpher
Transport Corp.,
312 F. Supp. 1081 5

Petition of Sincere Navigation
Corp., (DCED, La),
Ind. #68-22-54 5

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-536

MARGARET ANN WILKINS, as Administratrix of the Estate of WILLIAM LANE WILKINS, Deceased,

Petitioner,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Respondent.

PETITION FOR RE-HEARING AFTER DENIAL OF PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

The Petitioner for certiorari herein respectfully submits the following application for re-hearing of this Court's order made the 10th day of January, 1972 denying Petitioner's Petition for certiorari filed the 15th day of October , 1971.

PREVIOUS PROCEEDINGS

Heretofor the Petitioner herein, MARGARET ANN WILKINS, as Administratrix of the Estate of WILLIAM LANE WILKINS, deceased, petitioned this Court for certiorari after the decision of the Second Circuit Court of Appeals holding

that the Pennsylvania Rule, more particularly referred to hereinafter, was not applicable to a seaman's case under the Jones Act but was applicable only in collision cases.

Subsequent to the filing of the original Petition herein, the Respondent submitted an answering brief to the Petitioner's Petition for certiorari. At the time that this Court made its order, denying Petitioner's original Petition, there was a reply brief at the printer in preparation for submission to this Court. This brief pointed out that after the filing of the Petition herein, a most important case dealing directly with the subject of the Petition had been published, to with, SEABOARD SHIPPING CORPORATION, 449 F.2d 132 (CA2).

It is respectfully submitted that material contained in the reply brief that was never filed, and which will be alluded to hereinafter, contained material which might well have resulted in a different ruling on Petitioner's original Petition for certiorari and which should impel the Court to a granting of certiorari on this application for a re-hearing.

REASONS FOR RE-HEARING

It is respectfully submitted that there are two ultimate reasons why re-hearing and certiorari should be granted. These are:

1. The decision in the case of IN RE: SEABOARD SHIPPING CORPORATION, 449 F.2d 132, published subsequently to the filing of Petitioner's original Petition for certiorari, and,

2. A reply to the answering brief of the respondent, had it been received prior to the Court's decision, would have indicated misrepresentation, mis-statement and error in the answering brief with respect to material that may well have influenced the Court's decision.

POINT I

BOTH THE ERROR AND THE IMPORTANCE OF THE ISSUED SOUGHT TO BE BROUGHT BEFORE THIS COURT ARE INDICATED IN THE DECISION OF IN RE: SEABOARD SHIPPING CORPORATION, 449 F.2d 132.

Subsequently to the filing of the Petitioner's Petition herein, and, therefore, unavailable for inclusion in the original Petition itself, there was published the decision in the SEABOARD SHIPPING CORPORATION case. This decision of the Second Circuit Court of Appeals, decided by a different panel from the one that decided the within WILKINS case, and also by a panel different from the one that decided the PETITION OF LONG (THE SMITH VOYAGER), 439 F.2d 109, held, as did the SMITH VOYAGER, and directly contrary to the holding in the WILKINS case, that in the event of statutory violation, the doctrine of the Pennsylvania Rule could be invoked in a personal injury case brough pursuant to the Jones Act.

In flat contradiction to the decision in the WILKINS case herein, which the respondent would uphold, the Court of Appeals in the SEABOARD SHIPPING case stated:

> "Seaboard argues, however, that there was no evidence that any of the barge's defects or Seaboard's negligent acts caused the deaths, and that therefore there is a failure of proof. We need go no further here than to say, however, that given the statutory violations alone (the liferaft stowage and the overloading), Seaboard is not entitled to exoneration. The Pennsylvania, 86 U.S. (19 Wall.) 125, 136, 22 L.Ed. 148 (1873), makes it clear that the burden is on a ship in violation of a safety statute--in this case the barge--to show 'not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been'. Seaboard is wrong in its contention that admiralty applies this rule only in collision cases. Kernan v. American Dredging Co., 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958) (fire on a tug caused by open-flame kerosene lamp carried on a scow in statutory violation); The Denali, 112 F.2d 952 (9th Cir. 1940) (stranding case). It is true that a panel of this court has recently held the rule of THE PENNSYLVANIA inapplicable in the case of a seaman's death from a heart attach after a violation of statutory working

hour limitation. Wilkins v. American Isbrandtsen Lines, Inc., 446 F.2d 480 (2d Cir. June 21, 1971)." (Emphasis added).

Thus, two panels of the Second Circuit have held in one way and in our WILKINS case directly opposite. Nor can the opposing holdings be reconciled in any fashion. Furthermore, as appears from the original Petition filed herein, the holdings of the SEABOARD and SMITH VOYAGER cases are claimed by the respondent to be in conflict with the cases of NOLAN v. GREENE, 383 F.2d 814, and EPLING v. M.T. EPLING, 435 F.2d 732, decisions rendered by the Court of Appeals for the Sixth Circuit.

Additionally, your Petitioner would advise the Court that as late as January 24, 1972, the same issue was before the Trial Court in a case entitled LEWIS v. HUDSON WATERWAYS CORPORATION, in the Southern District of New York, Ind. #67 Civ. 4288. In that case, the Trial Judge chose to follow the WILKINS decision as distinguished from the latter SMITH VOYAGER and SEABOARD decisions, supra. The frequency of conflicting decisions on the important point here under consideration, in two important other recent decisions such as PETITION OF MARINE SULPHER TRANSPORT CORP., 312 F.supp 1081 (now on appeal and PETITION OF SINCERE NAVIGATION CORP. (DCED,La), Ind. #68-22-54, we believe must indicate to the Court the importance of a ruling on this issue. Whether or not the Pennsylvania Rule is applicable in a personal injury action under the Jones Act in the presence of

a statutory violation. Apart from the general applicability of the legal issue thus needing clarification, it is respectfully submitted that it is unfair to send the instant case back for new trial, as the ruling of the Second Circuit would do under a ruling which is at least prima facie erroneous.

POINT II

IN DENYING CERTIORARI, THIS COURT MAY HAVE BEEN MISLED BY THE ERRONEOUS ALLEGATIONS OF THE ANSWERING BRIEF OF THE RESPONDENT HEREIN.

Though posed in different forms in the original Petition herein, the essential question presented on this application for certiorari is whether or not the Pennsylvania Rule, which in the case of a statutory violation requires that,

> "....the violator is penalized with the burden of showing that the violation not only probably did not cause the accident, but that it could not have done so."

Essentially, the rule reverses the burden of proof as between the plaintiff and defendant where proof of statutory violation by the respondent is present. In its answering brief, the respondent made the clearly erroneous and unsupported statement that KERNAN v. AMERICAN DREDGING CO., 355 U.S. 426, supported its position that the Pennsylvania Rule was inapplicable. So also, the respondent, in its answering

brief, claimed that NOLAN v. GREENE, 383 F.2d 814, and EPLING v. M.T. EPLING, 435 F.2d 732, supported its position that the Pennsylvania Rule could not be applicable. Unlike KERNAN, these latter two cases could arguably be claimed to support the respondent's position, though more reasonably read, the facts in each of them were such as to indicate only that the Pennsylvania Rule could not be applicable to those cases because on the facts of each, the statutory violation complained of could, as a matter of fact, "not possibly" have contributed to the injury occurring.

So to, the respondent, in its answering brief, spoke without documentation of a "long history of well-respected and near unanimous maritime authority" as supporting its position. Though reference to our main Petition herein would clearly indicate that there is no such "long history" or "unanimous authority", it is possible that this Court was misled.

It is further likely that the Court may have been misled by the respondent's mis-statements and distortions in paraphrasing the question presented by the Petitioner's original Petition herein and in posing three questions which it claimed were presented by the Petition. Thus, the respordent posed the question,

> "Can a Petitioner seek a review by certiorari on the anticipatory theory that events on trial will be improper and adverse?"

Obviously, where it is claimed, as it is here, that ruling of the Circuit Court for the Second Circuit, which sends the case back for re-trial under an erroneous ruling extremely disadvantageous to the Administratrix, it is required to be anticipated that the ruling in the Court below will be erroneous. The Trial Court is required to follow the ruling of the Second Circuit in this case.

The Respondent further posed the question which assumed that there was no divergence between the decisions of the circuits or within the Second Circuit itself. Again, this divergence is clearly demonstrable by inspection, but in the absence of reply by the Petition, the Court may well have not been appreciative of the nature and extent, or for that matter, of the importance of the divergence.

Finally, the Respondent in its answering brief, alleged that the divergences between the various rulings were merely divergences of dicta. Again, inspection of the conflicting decisions must show that such is not the case, but in the haste that must attend up so many applications to this Court, it may well be that the Court was influenced by the erroneous and, unfortunately, answered allegation.

WHEREFORE it is respectfully submitted,

1. That the subject to be reviewed

is one of broad concern in an area where great divergence and conflict with attendant confusion has resulted.

2. The principle of law in question concerns a very substantial number of cases in an area of vital public importance.

3. It is urgent that the law in this area be settled not only to secure justice in the instant case, but to avoid the numerous appeals and uncertainties that presently obtain in this area.

4. That re-hearing should be granted, and upon re-hearing, the Petitioner's Petition for certiorari should likewise be granted and the case be directed to the Court of Appeals with instructions for the application of the Pennsylvania Rule or alternatively, that the case be placed upon the calendar of this Court for argument and determination in the normal course.

Respectfully submitted,

Donald Sherwood
401 Broadway
New York, N.Y. 10007
Counsel for Petitioner

Herbert Lebovici
Of Counsel